

Nguyen (Migration) [2022] AATA 185 (27 January 2022)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Van Minh Nguyen
VISA APPLICANT:	Ms Thi Thuy Trinh Cao
CASE NUMBER:	1836921
DIBP REFERENCE(S):	BCC2018/1956189
REPRESENTATIVE:	Mr Tuan Nguyen (MARN: 0961284)
MEMBER:	Donna Petrovich
DATE:	27 January 2022
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.211(2) of Schedule 2 to the Regulations • cl.309.221 of Schedule 2 to the Regulations

Statement made on 27 January 2022 at 5:21pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine long-term relationship – cultural engagement and marriage registered in home country – daily communication during COVID-19 travel restrictions – financial, household and social aspects of relationship – nature of commitment – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5F(2)(a), 65
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cls 309.211(2), 309.221

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 28 November 2018 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied for the visa on 24 April 2018 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211. The delegate was not satisfied that there was sufficient evidence that the visa applicant and sponsor/review applicant were in a genuine and long-term relationship.
4. The review applicant/sponsor appeared before the Tribunal on 9 December 2021 to give evidence and present arguments. The Tribunal also received oral evidence from his son, Mr Tuan Nguyen, the visa applicant, Ms Thi Thuy Trinh Cao, and her cousin, Trinh Hoang.

5. Background

6. The applicant is 37 year old female, currently studying English and to be a nail technician. She previously worked in her sister's clothing shop, but has spent time out of work due to the current circumstance of Covid 19. The Tribunal heard that the visa applicant and sponsor/review applicant met at a market in Bheoc Tinh Tou on 2 August 2013, where they spoke briefly. Later the sponsor/review applicant asked his sister about the visa applicant. Subsequently, the visa applicant and sponsor/review applicant went for coffee the next day.
7. They continued to meet and went out each day while the sponsor/review applicant was in Vietnam. They maintained communication by Viber when the sponsor/review applicant returned to Australia. In 2015 when he returned to Vietnam, they held an engagement ceremony with one hundred and sixty (160) people in attendance. They travelled together, for a number of days and when they returned from their trip (honeymoon), they lived together for four (4) months in the home of the sponsor's/review applicant's father.
8. The Tribunal heard that the celebration was held in a family home. They had a banquet service, decorations, food, beverages, and hired chairs and tables. At the Tribunal hearing, evidence was given by the visa applicant that the sponsor/review applicant paid for the celebration, called an engagement, which is accepted in Vietnamese culture as a wedding. There is an acceptance in Vietnamese culture that this is an alternative in cases when one of a couple is overseas. The couple provided a copy of a wedding certificate dated 26 March 2018 which they received after registering for marriage with Vietnamese authorities.
9. The visa applicant and sponsor/review applicant have not seen each other since his last visit to Vietnam around June – July 2019, a situation that has been exacerbated by Covid 19.
10. The review applicant/sponsor was represented in relation to the review by his registered migration agent.

11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration

12. CONSIDERATION OF CLAIMS AND EVIDENCE

13. The issue in the present case is whether the visa applicant meets cl. 309.211(2) and is married and in a genuine and continuing relationship.

Whether the parties are in a spouse or de facto relationship

14. Clause 309.211(2) and clause 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant/sponsor, who is an Australian citizen.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects of the relationship, the nature of the visa applicant's and review applicant's household, and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

16. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
17. The Tribunal received a copy of a marriage certificate which was issued on 26 March 2018 after registering with Vietnamese authorities. The Tribunal heard that it is now generally accepted in Vietnamese society to become engaged as it is a declaration of the union of a couple. This is accepted as a marriage, in particular when one party is overseas. A receipt dated 7 August 2015, for the purchase of jewellery, including a wedding ring purchase, by the couple was submitted to the Tribunal. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

18. Financial aspects of the relationship

19. The Tribunal heard that the sponsor/review applicant sends money to the visa applicant on a monthly basis. Extensive evidence of money orders dated from 2015 to 2021 were submitted to the Tribunal to substantiate this claim. As the couple live in separate countries it is impossible for them to have joint bank accounts. Due to their current circumstances, which requires that they live apart in separate countries, the couple have no shared property. The Tribunal gives some weight in favour of the application on the basis that there is a sharing of finances by the sponsor/review applicant, with the applicant, to support her in Vietnam.

20. Nature of the household

21. The Tribunal heard that the visa applicant and sponsor/review applicant had spent time together when they were able to, and the sponsor/review applicant stayed in Vietnam for four (4) to five (5) weeks during his visit to Vietnam. The couple lived together during these visits. It was explained at the Tribunal hearing by the sponsor/review applicant, that the visa applicant would get up early, make breakfast which included coffee and then go to the market. The sponsor/review applicant would help around the house and tidy up. This evidence leads the Tribunal to the view that the visa applicant and sponsor/review applicant lead a simple life together when they live in the same house. The Tribunal heard of the enjoyment that they share in this simple lifestyle together, which enhances their happiness and relationship together. The couple enjoy simple tasks and time spent together.
22. The sponsor's son provided evidence to the Tribunal regarding his father's divorce. He also detailed his father's unhappiness and depression before he met and developed a relationship with the visa applicant. He told the Tribunal that although the couple are not together, they speak every day and the visa applicant is all his father talks about. He told the Tribunal that he has witnessed their daily conversations and been included in these conversations. He told the Tribunal that his father is truly happy. The Tribunal places some weight in favour of the application in this regard.

23. Social aspects

24. In the time that they have spent together, the couple have enjoyed their engagement (wedding celebration) with 160 family and friends. They have provided photographic evidence of this event. Although the photographs of others in attendance at the engagement are limited, the photographs demonstrate the celebration. The Tribunal heard that the sponsor/review applicant has few friends in Vietnam, and that they spent their time with family. The Tribunal heard evidence from the visa applicant's sister. She said that she had spent time with them in Vietnam, and that she had talked with the sponsor/review applicant in his daily telephone calls to her sister (the visa applicant). The Tribunal accepts the submissions made by the visa applicant's sister as credible and genuine and places some weight in favour of the application in this regard.

25. Nature of the persons commitment to each other

26. The couple have been separated and living in separate countries. They have not seen each other for two (2) years as a result of COVID 19. However, the Tribunal received evidence from the visa applicant's sister, with whom she lives, of the daily telephone calls via Viber between the couple. The visa applicant's sister was a witness to these daily telephone calls between the couple made between 5:30 pm Vietnam time (around 9 pm Melbourne time). The Tribunal was also provided with documentary evidence of these calls from January 2016 to 2021. The Tribunal also heard of the visa applicant's commitment to the care of her father, whom she looked after daily until his passing. The Tribunal has considered the commitment that the couple show each other, their relationship with other family members and the care demonstrated to other family members. The Tribunal is of the view that this evidences that the couple have a genuine commitment to each other and places some weight in favour of the application.

27. Any other circumstance

28. The Tribunal heard that the review applicant/sponsor had previously employed a migration agent, who had taken the money of the couple, but failed to provide the evidence required to support the visa application at the Department stage. Since this time, the review applicant/sponsor had compiled the required evidence to support the visa application.

However, he was unsure how to progress his case, until he was assisted by his current migration agent. The representative explained to the Tribunal that the visa applicant and the sponsor/review applicant have no knowledge of the processes required for a successful application. The representative submitted that their relationship may not have looked genuine when they previously lodged their visa application with the Department, as they are simple people, not educated, with limited resources available to them. The Tribunal gives no weight to the application in this regard.

29. The representative in support of the review applicant submitted to the Tribunal a written submission, with supporting evidence. Statutory declarations were provided to the Tribunal from Mr Van Minh Nguyen, and his younger sister and neighbour (both of whom live in Vietnam). The cousin of the visa applicant, the visa applicant herself and sons of the sponsor (both of whom live in Australia) provided statutory declarations to the Tribunal. Photographs submitted to the Tribunal evidenced the couple's engagement and social activities undertaken together. Money transfers for the years 2015 to 2021 were provided to the Tribunal which evidenced payments from the sponsor/review applicant to the visa applicant. Minh Van Nguyen's non-lapsing death benefit nomination, dated 11 January 2021, leaving 100 per cent of the benefit to his spouse, Thi Thuy Trinh Cao, was also submitted to the Tribunal. Other evidence submitted, included the sponsor's/review applicant's Notice of Assessment from the Australian Tax Office (ATO) for the years ending 30 June 2016 and 30 June 2017, handwritten documents with financial calculations and a jewellery receipt dated 7 August 2015, which detailed the purchase of a wedding ring by the couple. The representative also provided telephone records and Viber records, evidencing communication between the couple covering the years 2016 to 2021.
30. The Tribunal in considering all of the evidence, is satisfied that the visa applicant and sponsor/review applicant have a mutual commitment to each other. The Tribunal is of the view that the couple is in a genuine and continuing relationship which has endured since they were married on 26 March 2018. The Tribunal is satisfied that the couple live together whenever they can, seek to live together on a permanent basis, and are only living separately because of the circumstances which they are in.
31. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
32. Therefore, the visa applicant meets cl.309.211 and cl.309.221.
33. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

34. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Donna Petrovich
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).